COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF DUDGEON v. THE UNITED KINGDOM

(Application no. 7525/76)

JUDGMENT

STRASBOURG

22 October 1981

In the Dudgeon case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. M. ZEKIA,
Mr. J. CREMONA,
Mr. THÓR VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. G. LAGERGREN,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. E. GARCIA DE ENTERRIA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 24 and 25 April and from 21 to 23 September 1981,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The Dudgeon case was referred to the Court by the European Commission of Human Rights ("the Commission"). The case originated in an application against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on 22 May 1976 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom citizen, Mr. Jeffrey Dudgeon.

2. The Commission’s request was lodged with the registry of the Court on 18 July 1980, within the period of three months laid down by Articles 32

par. 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration made by the United Kingdom recognising the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the Commission's request is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Article 8 (art. 8) of the Convention, taken alone or in conjunction with Article 14 (art. 14+8).

3. The Chamber of seven judges to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. G. Balladore Pallieri, the President of the Court (Rule 21 par. 3 (b) of the Rules of Court). On 30 September 1980, the President drew by lot, in the presence of the Registrar, the names of the five other members of the Chamber, namely Mr. G. Wiarda, Mr. D. Evrigenis, Mr. G. Lagergren, Mr. L. Liesch and Mr. J. Pinheiro Farinha (Article 43 in fine of the Convention and Rule 21 par. 4) (art. 43).

4. Mr. Balladore Pallieri assumed the office of President of the Chamber (Rule 21 par. 5). He ascertained, through the Registrar, the views of the Agent of the Government of the United Kingdom ("the Government") and the Delegates of the Commission as regards the procedure to be followed. On 24 October 1980, he directed that the Agent of the Government should have until 24 December to file a memorial and that the Delegates should be entitled to file a memorial in reply within two months from the date of the transmission to them by the Registrar of the Government's memorial. On 20 December, Mr. Wiarda, the Vice-President of the Court, who had replaced Mr. Balladore Pallieri as President of the Chamber following the latter's death (Rule 21 par. 5), agreed to extend the first of these time-limits until 6 February 1981.

5. On 30 January 1981, the Chamber decided under Rule 48 of the Rules of Court to relinquish jurisdiction forthwith in favour of the plenary Court.

6. The Government's memorial was received at the registry on 6 February and that of the Commission on 1 April; appended to the Commission's memorial were the applicant's observations on the Government's memorial.

7. After consulting through the Registrar, the Agent of the Government and the Delegates of the Commission, Mr. Wiarda, who had in the meantime been elected President of the Court, directed on 2 April 1981 that the oral proceedings should open on 23 April 1981.

8. On 3 April, the applicant invited the Court to hear expert evidence from Dr. Dannacker, Assistant Professor at the University of Frankfurt. In a letter received at the registry on 15 April, the Delegates of the Commission stated that they left it to the Court to decide whether such evidence was necessary.

9. A document was filed by the Government on 14 April 1981.

10. The oral hearings were held in public at the Human Rights Building, Strasbourg, on 23 April 1981. Immediately before their opening, the Court had held a preparatory meeting and decided not to hear expert evidence.

There appeared before the Court:

- for the Government:

Mrs. A. GLOVER, Legal Adviser,
Foreign and Commonwealth Office, *Agent*,
Mr. N. BRATZA, Barrister-at-law,
Mr. B. KERR, Barrister-at-law, *Counsel*,
Mr. R. TOMLINSON, Home Office,
Mr. D. CHESTERTON, Northern Ireland Office,
Mr. N. BRIDGES, Northern Ireland Office, *Advisers*;

- for the Commission:

Mr. J. FAWCETT,
Mr. G. TENEKIDES, *Delegates*,
Lord GIFFORD, Barrister-at-law,
Mr. T. MUNYARD, Barrister-at-law,
Mr. P. CRANE, Solicitor, assisting the Delegates under Rule 29 par. 1, second sentence, of the Rules of Court.

The Court heard addresses by the Delegates and Lord Gifford for the Commission, and by Mr. Kerr and Mr. Bratza for the Government. Lord Gifford submitted various documents through the Delegates of the Commission.

11. On 11 and 12 May, respectively, the Registrar received from the Agent of the Government and from the Commission's Delegates and those assisting them their written replies to certain questions put by the Court and/or their written observations on the documents filed before and during the hearings.

12. In September 1981, Mr. Wiarda was prevented from taking part in the consideration of the case; Mr. Ryssdal, as Vice-President of the Court, thereafter presided over the Court.

AS TO THE FACTS

13. Mr. Jeffrey Dudgeon, who is 35 years of age, is a shipping clerk resident in Belfast, Northern Ireland.

Mr. Dudgeon is a homosexual and his complaints are directed primarily against the existence in Northern Ireland of laws which have the effect of making certain homosexual acts between consenting adult males criminal offences.

A. The relevant law in Northern Ireland

14. The relevant provisions currently in force in Northern Ireland are contained in the Offences against the Person Act 1861 ("the 1861 Act"), the Criminal Law Amendment Act 1885 ("the 1855 Act") and the common law.

Under sections 61 and 62 of the 1861 Act, committing and attempting to commit buggery are made offences punishable with maximum sentences of life imprisonment and ten years' imprisonment, respectively. Buggery consists of sexual intercourse per anum by a man with a man or a woman, or per anum or per vaginam by a man or a woman with an animal.

By section 11 of the 1885 Act, it is an offence, punishable with a maximum of two years' imprisonment, for any male person, in public or in private, to commit an act of "gross indecency" with another male. "Gross indecency" is not statutorily defined but relates to any act involving sexual indecency between male persons; according to the evidence submitted to the Wolfenden Committee (see paragraph 17 below), it usually takes the form of mutual masturbation, inter-crural contact or oral-genital contact. At common law, an attempt to commit an offence is itself an offence and, accordingly, it is an offence to attempt to commit an act proscribed by section 11 of the 1885 Act. An attempt is in theory punishable in Northern Ireland by an unlimited sentence (but as to this, see paragraph 31 below).

Consent is no defence to any of these offences and no distinction regarding age is made in the text of the Acts.

An account of how the law is applied in practice is given below at paragraphs 29 to 31.

15. Acts of homosexuality between females are not, and have never been, criminal offences, although the offence of indecent assault may be committed by one woman on another under the age of 17.

As regards heterosexual relations, it is an offence, subject to certain exceptions, for a man to have sexual intercourse with a girl under the age of 17. Until 1950 the age of consent of a girl to sexual intercourse was 16 in both England and Wales and in Northern Ireland, but by legislation introduced in that year the age of consent was increased to 17 in Northern Ireland. While in relation to the corresponding offence in England and Wales it is a defence for a man under the age of 24 to show that he believed with reasonable cause the girl to be over 16 years of age, no such defence is available under Northern Ireland law.

B. The law and reform of the law in the rest of the United Kingdom

16. The 1861 and 1885 Acts were passed by the United Kingdom Parliament. When enacted, they applied to England and Wales, to all Ireland, then unpartitioned and an integral part of the United Kingdom, and also, in the case of the 1885 Act, to Scotland.

1. England and Wales

17. In England and Wales the current law on male homosexual acts is contained in the Sexual Offences Act 1956 ("the 1956 Act") as amended by the Sexual Offences Act 1967 ("the 1967 Act").

The 1956 Act, an Act consolidating the existing statute law, made it an offence for any person to commit buggery with another person or an animal (section 12) and an offence for a man to commit an act of "gross indecency" with another man (section 13).

The 1967 Act, which was introduced into Parliament as a Private Member's Bill, was passed to give effect to the recommendations concerning homosexuality made in 1957 in the report of the Departmental Committee on Homosexual Offences and Prostitution established under the chairmanship of Sir John Wolfenden (the "Wolfenden Committee" and "Wolfenden report"). The Wolfenden Committee regarded the function of the criminal law in this field as

> "to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, or economic dependence",

but not

> "to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined".

The Wolfenden Committee concluded that homosexual behaviour between consenting adults in private was part of the "realm of private morality and immorality which is, in brief and crude terms, not the law's business" and should no longer be criminal.

The 1967 Act qualified sections 12 and 13 of the 1956 Act by providing that, subject to certain exceptions concerning mental patients, members of the armed forces and merchant seamen, buggery and acts of gross indecency in private between consenting males aged 21 years or over should not be criminal offences. It remains a crime to commit a homosexual act, of the kind referred to in these sections, with a person aged less than 21 in any circumstances.

The age of majority for certain purposes, including capacity to marry without parental consent and to enter into contractual relations, was reduced from 21 to 18 by the Family Law Reform Act 1969. The voting age and the minimum age for jury service were likewise reduced to 18 by the Representation of the People Act 1969 and the Criminal Justice Act 1972, respectively.

In 1977, the House of Lords rejected a Bill aimed at reducing the age of consent for private homosexual act to 18. Subsequently, in a report

published in April 1981, a committee established by the Home Office, namely the Policy Advisory Committee on Sexual Offences, recommended that the minimum age for homosexual relations between males should be reduced to 18. A minority of five members favoured a reduction to 16.

2. Scotland

18. When the applicant lodged his complaint in 1976, the relevant law applicable was substantially similar to that currently in force in Northern Ireland. Section 7 of the Sexual Offences (Scotland) Act 1976, a consolidating provision re-enacting section 11 of the 1885 Act, provided for the offence of gross indecency; the offence of sodomy existed at common law. However, successive Lord Advocates had stated in Parliament that their policy was not to prosecute in respect of acts which would not have been punishable if the 1967 Act had applied in Scotland. The Criminal Justice (Scotland) Act 1980 ("the 1980 Act") formally brought Scottish law into line with that of England and Wales. As in the case of the 1967 Act, the change in the law originated in amendments introduced in Parliament by a Private Member.

C. Constitutional position of Northern Ireland

19. Under an Act of the United Kingdom Parliament, the Government of Ireland Act 1920, a separate Parliament for Northern Ireland was established with power to legislate on all matters devolved by that Act, including criminal and social law. An executive known as the Government of Northern Ireland was also established with Ministers responsible for the different areas of the devolved powers. By convention, during the life of the Northern Ireland Parliament (1921-9172) the United Kingdom Parliament rarely, if ever, legislated for Northern Ireland in respect of the devolved matters - in particular social matters - falling within the former Parliament's legislative competence.

20. In March 1972, the Northern Ireland Parliament was prorogued and Northern Ireland was made subject to "direct rule" from Westminster (see the judgment of 18 January 1978 in the case of Ireland v. the United Kingdom, Series A no. 25, pp. 10 and 20-21, par. 19 and 49). Since that date, except for a period of five months in 1974 when certain legislative and executive powers were devolved to a Northern Ireland Assembly and Executive, legislation for Northern Ireland in all fields has been the responsibility of the United Kingdom Parliament. There are 12 members of the United Kingdom House of Commons, out of a total of 635, who represent constituencies in Northern Ireland.

Under the provisions currently in force, power is conferred on Her Majesty to legislate for Northern Ireland by Order in Council. Save where there are reasons of urgency, no recommendation may be made to Her

Majesty to make an Order in Council under these provisions unless a draft of the Order has been approved by each House of Parliament. It is the responsibility of the Government to prepare a draft Order and to lay it before Parliament for approval. A draft can only be approved or rejected in toto by Parliament, but not amended. The function of the Queen in Council in making an Order once it has been approved by Parliament is purely formal. In practice, much legislation for Northern Ireland is effected in this form rather than by means of an Act of Parliament.

D. Proposals for reform in Northern Ireland

21. No measures comparable to the 1967 Act were ever introduced into the Northern Ireland Parliament either by the Government of Northern Ireland or by any Private Member.

22. In July 1976, following the failure of the Northern Ireland Constitutional Convention to work out a satisfactory form of devolved government for Northern Ireland, the then Secretary of State for Northern Ireland announced in Parliament that the United Kingdom Government would thenceforth by looking closely at the need for legislation in fields which it had previously been thought appropriate to leave to a future devolved government, in particular with a view to bringing Northern Ireland law more closely into harmony with laws in other parts of the country. He cited homosexuality and divorce as possible areas for action. However, recognising the difficulties about such subjects in Northern Ireland, he indicated that he would welcome the views of the local people, including those of the Standing Advisory Commission on Human Rights ("the Advisory Commission") and of Members of Parliament representing Northern Ireland constituencies.

23. The Advisory Commission, which is an independent statutory body, was accordingly invited to consider the matter. As regards homosexual offences, the Advisory Commission received evidence from a number of persons and organisations, religious and secular. No representations were made by the Roman Catholic Church in Northern Ireland or by any of the 12 Northern Ireland Members of the United Kingdom House of Commons.

The Advisory Commission published its report in April 1977. The Advisory Commission concluded that most people did not regard it as satisfactory to retain the existing differences in the law with regard to homosexuality and that few only would be strongly opposed to changes bringing Northern Ireland law into conformity with that in England and Wales. On the other hand, it did not consider that there would be support for legislation which went further, in particular by lowering the age of consent. Its recommendations were that the law of Northern Ireland should be brought into line with the 1967 Act, but that future amendments to the 1967 Act should not automatically apply to Northern Ireland.

24. On 27 July 1978, the Government published a proposal for a draft Homosexual Offences (Northern Ireland) Order 1978, the effect of which would have been to bring Northern Ireland law on the matter broadly into line with that of England and Wales. In particular, homosexual acts in private between two consenting male adults over the age of 21 would no longer have been punishable.

In a foreword to the proposal, the responsible Minister stated that "the Government had always recognised that homosexuality is an issue about which some people in Northern Ireland hold strong conscientious or religious opinions". He summarised the main arguments for and against reform as follows:

> "In brief, there are two differing viewpoints. One, based on an interpretation of religious principles, holds that homosexual acts under any circumstances are immoral and that the criminal law should be used, by treating them as crimes, to enforce moral behaviour. The other view distinguishes between, on the one hand that area of private morality within which a homosexual individual can (as a matter of civil liberty) exercise his private right of conscience and, on the other hand, the area of public concern where the State ought and must use the law for the protection of society and in particular for the protection of children, those who are mentally retarded and others who are incapable of valid personal consent.
>
> I have during my discussions with religious and other groups heard both these viewpoints expressed with sincerity and I understand the convictions that underlie both points of view. There are in addition other considerations which must be taken into account. For example it has been pointed out that the present law is difficult to enforce, that fear of exposure can make a homosexual particularly vulnerable to blackmail and that this fear of exposure can cause unhappiness not only for the homosexual himself but also for his family and friends.
>
> While recognising these differing viewpoints I believe we should not overlook the common ground. Most people will agree that the young must be given special protection; and most people will also agree that law should be capable of being enforced. Moreover those who are against reform have compassion and respect for individual rights just as much as those in favour of reform have concern for the welfare of society. For the individuals in society, as for Government, there is thus a difficult balance of judgment to be arrived at."

Public comment on the proposed amendment to the law was invited.

25. The numerous comments received by the Government in response to their invitation, during and after the formal period of consultation, revealed a substantial division of opinion. On a simple count of heads, there was a large majority of individuals and institutions against the proposal for a draft Order.

Those opposed to reform included a number of senior judges, District Councils, Orange Lodges and other organisations, generally of a religious character and in some cases engaged in youth activities. A petition to "Save Ulster from Sodomy" organised by the Democratic Unionist Party led by Mr. Ian Paisley, a Member of the United Kingdom House of Commons,

collected nearly 70.000 signatures. The strongest opposition came from certain religious groups. In particular, the Roman Catholic Bishops saw the proposal as an invitation to Northern Irish society to change radically its moral code in a manner liable to bring about more serious problems than anything attributable to the present law. The Roman Catholic Bishops argued that such a change in the law would lead to a further decline in moral standards and to a climate of moral laxity which would endanger and put undesirable pressures on those most vulnerable, namely the young. Similarly, the Presbyterian Church in Ireland, whilst understanding the arguments for the change, made the point that the removal from the purview of the criminal law of private homosexual acts between consenting adult males might be taken by the public as an implicit licence if not approval for such practices and as a change in public policy towards a further relaxation of moral standards.

The strongest support for change came from organisations representing homosexuals and social work agencies. They claimed that the existing law was unnecessary and that it created hardship and distress for a substantial minority of persons affected by it. It was urged that the sphere of morality should be kept distinct from that of the criminal law and that considerations of the personal freedom of the individual should in such matters be paramount. For its part, the Standing Committee of the General Synod of the Church of Ireland accepted that homosexual acts in private between consenting adults aged 21 and over should be removed from the realm of criminal offence, but in amplification commented that this did not mean that the Church considered homosexuality to be an acceptable norm.

Press reports indicated that most of the political formations had expressed favourable views. However, none of the 12 Northern Ireland Members of Parliament publicly supported the proposed reform and several of them openly opposed it. An opinion poll conducted in Northern Ireland in January 1978 indicated that the people interviewed were evenly divided on the global question of the desirability of reforming the law on divorce and homosexuality so as to bring it into line with that of England and Wales.

26. On 2 July 1979, the then Secretary of State for Northern Ireland, in announcing to Parliament that the Government did not intend to pursue the proposed reform, stated:

> "Consultation showed that strong views are held in Northern Ireland, both for and against in the existing law. Although it is not possible to say with certainty what is the feeling of the majority of people in the province, it is clear that is substantial body of opinion there (embracing a wide range of religious as well as political opinion) is opposed to the proposed change ... [T]he Government have [also] taken into account ... the fact that legislation on an issue such as the one dealt with in the draft order has traditionally been a matter for the initiative of a Private Member rather than for Government. At present, therefore, the Government propose to take no further action ..., but we would be prepared to reconsider the matter if there were any developments in the future which were relevant."

27. In its annual report for 1979-1980, the Advisory Commission reiterated its view that law should be reformed. It believed that there was a danger that the volume of opposition might be exaggerated.

28. Since the Northern Ireland Parliament was prorogued in 1972 (see paragraph 20 above), there has been no initiative of any kind for legislation to amend the 1861 and 1885 Acts from any of the mainstream political organisations or movements in Northern Ireland.

E. Enforcement of the law in Northern Ireland

29. In accordance with the general law, anyone, including a private person, may bring a prosecution for a homosexual offence, subject to the Director of Public Prosecutions' power to assume the conduct of the proceedings and, if he thinks fit, discontinue them. The evidence as to prosecutions for homosexual offences between 1972 and 1981 reveals that none has been brought by a private person during that time.

30. During the period from January 1972 to October 1980 there were 62 prosecutions for homosexual offences in Northern Ireland. The large majority of these cases involved minors that is persons under 18; a few involved persons aged 18 to 21 or mental patients or prisoners. So far as the Government are aware from investigation of the records, no one was prosecuted in Northern Ireland during the period in question for an act which would clearly not have been an offence if committed in England or Wales. There is, however, no stated policy not to prosecute in respect of such acts. As was explained to the Court by the Government, instructions operative within the office of the Director of Public Prosecutions reserve the decision on whether to prosecute in each individual case to the Director personally, in consultation with the Attorney General, the sole criterion being whether, on all the facts and circumstances of that case, a prosecution would be in the public interest.

31. According to the Government, the maximum sentences prescribed by the 1861 and 1885 Acts are appropriate only for the most grave instances of the relevant offence and in practice no court would ever contemplate imposing the maximum sentence for offences committed between consenting parties, whether in private or in public. Furthermore, although liable to an unlimited sentence, a man convicted of an attempt to commit gross indecency would in practice never receive a sentence greater than that appropriate if the offence had been completed; in general, the sentence would be significantly less. In all cases of homosexual offences the actual penalty imposed will depend on the particular circumstances.

F. The personal circumstances of the applicant

32. The applicant has, on his own evidence, been consciously homosexual from the age of 14. For some time he and others have been conducting a campaign aimed at bringing the law in Northern Ireland into line with that in force in England and Wales and, if possible, achieving a minimum age of consent lower than 21 years.

33. On 21 January 1976, the police went to Mr. Dudgeon's address to execute a warrant under the Misuse of Drugs Act 1971. During the search of the house a quantity of cannabis was found which subsequently led to another person being charged with drug offences. Personal papers, including correspondence and diaries, belonging to the applicant in which were described homosexual activities were also found and seized. As a result, he was asked to go to a police station where for about four and a half hours he was questioned, on the basis of these papers, about his sexual life. The police investigation file was sent to the Director of Prosecutions. It was considered with a view to instituting proceedings for the offence of gross indecency between males. The Director, in consultation with the Attorney General, decided that it would not be in the public interest for proceedings to be brought. Mr. Dudgeon was so informed in February 1977 and his papers, with annotations marked over them, were returned to him.

PROCEEDINGS BEFORE THE COMMISSION

34. In his application, lodged with the Commission on 22 May 1976, Mr. Dudgeon claimed that:

- the existence, in the criminal law in force in Northern Ireland, of various offences capable of relating to male homosexual conduct and the police investigation in January 1976 constituted an unjustified interference with his right to respect for his private life, in breach of Article 8 (art. 8) of the Convention;

- he had suffered discrimination, within the meaning of Article 14 (art. 14) of the Convention, on grounds of sex, sexuality and residence.

The applicant also claimed compensation.

35. By decision of 3 March 1978, the Commission declared admissible the applicant's complaints concerning the laws in force in Northern Ireland prohibiting homosexual acts between males (or attempts at such acts), but inadmissible as being manifestly ill-founded his complaints concerning the existence in Northern Ireland of certain common law offences.

In its report adopted on 13 March 1980 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion that:

- the legal prohibition of private consensual homosexual acts involving male persons under 21 years of age was not in breach of the applicant's rights either under Article 8 (art. 8) (eight votes to two) or under Article 14

read in conjunction with Article 8 (art. 14+8) (eight votes to one, with one abstention);

- the legal prohibition of such acts between male persons over 21 years of age breached the applicant's right to respect for his private life under Article 8 (art. 8) (nine votes to one);

- it was not necessary to examine the question whether the last-mentioned prohibition also violated Article 14 read in conjunction with Article 8 (art. 14+8) (nine votes to one).

The report contains one separate opinion.

FINAL SUBMISSIONS MADE TO THE COURT

36. At the hearing on 23 April 1981, the Government maintained the submissions set out in their memorial, whereby they requested the Court:

"(1) With regard to Article 8 (art. 8)

To decide and declare that the present laws in Northern Ireland relating to homosexual acts do not give rise to a breach of Article 8 (art. 8) of the Convention, in that the laws are necessary in a democratic society for the protection of morals and for the protection of the rights of other for the purposes of paragraph 2 of Article 8 (art. 8-2).

(2) With regard to Article 14, in conjunction with Article 8 (art. 14+8)

(i) To decide and declare that the facts disclose no breach of Article 14, read in conjunction with Article 8 (art. 14+8) of the Convention;

alternatively, if and in so far as a breach of Article 8 (art. 8) of the Convention is found

(ii) To decide and declare that it is unnecessary to examine the question whether the laws in Northern Ireland relating to homosexual acts give rise to a separate breach of Article 14, read in conjunction with Article 8 (art. 14+8) of the Convention".

AS TO THE LAW

I. THE ALLEGED BREACH OF ARTICLE 8 (art. 8)

A. Introduction

37. The applicant complained that under the law in force in Northern Ireland he is liable to criminal prosecution on account of his homosexual conduct and that he has experienced fear, suffering and psychological distress directly caused by the very existence of the laws in question - including fear of harassment and blackmail. He further complained that, following the search of his house in January 1976, he was questioned by the police about certain homosexual activities and that personal papers belonging to him were seized during the search and not returned until more than a year later.

He alleged that, in breach of Article 8 (art. 8) of the Convention, he has thereby suffered, and continues to suffer, an unjustified interference with his right to respect for his private life.

38. Article 8 (art. 8) provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

39. Although it is not homosexuality itself which is prohibited but the particular acts of gross indecency between males and buggery (see paragraph 14 above), there can be no doubt but that male homosexual practices whose prohibition is the subject of the applicant's complaints come within the scope of the offences punishable under the impugned legislation; it is on that basis that the case has been argued by the Government, the applicant and the Commission. Furthermore, the offences are committed whether the act takes place in public or in private, whatever the age or relationship of the participants involved, and whether or not the participants are consenting. It is evident from Mr. Dudgeon's submissions, however, that his complaint was in essence directed against the fact that homosexual acts which he might commit in private with other males capable of valid consent are criminal offences under the law of Northern Ireland.

B. The existence of an interference with an Article 8 (art. 8) right

40. The Commission saw no reason to doubt the general truth of the applicant's allegations concerning the fear and distress that he has suffered in consequence of the existence of the laws in question. The Commission unanimously concluded that "the legislation complained of interferes with the applicant's right to respect for his private life guaranteed by Article 8 par. 1 (art. 8-1), in so far as it prohibits homosexual acts committed in

private between consenting males" (see paragraphs 94 and 97 of the Commission's report).

The Government, without conceding the point, did not dispute that Mr. Dudgeon is directly affected by the laws and entitled to claim to be a "victim" thereof under Article 25 (art. 25) of the Convention. Nor did the Government contest the Commission's above-quoted conclusion.

41. The Court sees no reason to differ from the views of the Commission: the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1 (art. 8-1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life (see, mutatis mutandis, the Marckx judgment of 13 June 1979, Series A no. 31, p. 13, par. 27): either he respects the law and refrains from engaging – even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.

It cannot be said that the law in question is a dead letter in this sphere. It was, and still is, applied so as to prosecute persons with regard to private consensual homosexual acts involving males under 21 years of age (see paragraph 30 above). Although no proceedings seem to have been brought in recent years with regard to such acts involving only males over 21 years of age, apart from mental patients, there is no stated policy on the part of the authorities not to enforce the law in this respect (ibid). Furthermore, apart from prosecution by the Director of Public Prosecution, there always remains the possibility of a private prosecution (see paragraph 29 above).

Moreover, the police investigation in January 1976 was, in relation to the legislation in question, a specific measure of implementation - albeit short of actual prosecution - which directly affected the applicant in the enjoyment of his right to respect for his private life (see paragraph 33 above). As such, it showed that the threat hanging over him was real.

C. The existence of a justification for the interference found by the Court

42. In the Government's submission, the law in Northern Ireland relating to homosexual acts does not give rise to a breach of Article 8 (art. 8), in that it is justified by the terms of paragraph 2 of the Article (art. 8-2). This contention was disputed by both the applicant and the Commission.

43. An interference with the exercise of an Article 8 (art. 8) right will not be compatible with paragraph 2 (art. 8-2) unless it is "in accordance with the law", has an aim or aims that is or are legitimate under that paragraph and is "necessary in a democratic society" for the aforesaid aim or aims (see,

mutatis, mutandis, the Young, James and Webster judgment of 13 August 1981, Series A no. 44, p. 24, par. 59).

44. It has not been contested that the first of these three conditions was met. As the Commission pointed out in paragraph 99 of its report, the interference is plainly "in accordance with the law" since it results from the existence of certain provisions in the 1861 and 1885 Acts and the common law (see paragraph 14 above).

45. It next falls to be determined whether the interference is aimed at "the protection of morals" or "the protection of the rights and freedoms of others", the two purposes relied on by the Government.

46. The 1861 and 1885 Acts were passed in order to enforce the then prevailing conception of sexual morality. Originally they applied to England and Wales, to all Ireland, then unpartitioned, and also, in the case of the 1885 Act, to Scotland (see paragraph 16 above). In recent years the scope of the legislation has been restricted in England and Wales (with the 1967 Act) and subsequently in Scotland (with the 1980 Act): with certain exceptions it is no longer a criminal offence for two consenting males over 21 years of age to commit homosexual acts in private (see paragraphs 17 and 18 above). In Northern Ireland, in contrast, the law has remained unchanged. The decision announced in July 1979 to take no further action in relation to the proposal to amend the existing law was, the Court accepts, prompted by what the United Kingdom Government judged to be the strength of feeling in Northern Ireland against the proposed change, and in particular the strength of the view that it would be seriously damaging to the moral fabric of Northern Irish society (see paragraphs 25 and 26 above). This being so, the general aim pursued by the legislation remains the protection of morals in the sense of moral standards obtaining in Northern Ireland.

47. Both the Commission and the Government took the view that, in so far as the legislation seeks to safeguard young persons from undesirable and harmful pressures and attentions, it is also aimed at "the protection of the rights and freedoms of others". The Court recognises that one of the purposes of the legislation is to afford safeguards for vulnerable members of society, such as the young, against the consequences of homosexual practices. However, it is somewhat artificial in this context to draw a rigid distinction between "protection of the rights and freedoms of others" and "protection of morals". The latter may imply safeguarding the moral ethos or moral standards of a society as a whole (see paragraph 108 of the Commission’s report), but may also, as the Government pointed out, cover protection of the moral interests and welfare of a particular section of society, for example schoolchildren (see the Handyside judgment of 7 December 1976, Series A no. 24, p. 25, par. 52 in fine - in relation to Article 10 par. 2 (art. 10-2) of the Convention). Thus, "protection of the rights and freedoms of others", when meaning the safeguarding of the moral interests and welfare of certain individuals or classes of individuals who are in need

of special protection for reasons such as lack of maturity, mental disability or state of dependence, amounts to one aspect of "protection of morals" (see, mutatis mutandis, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 34, par. 56). The Court will therefore take account of the two aims on this basis.

48. As the Commission rightly observed in its report (at paragraph 101), the cardinal issue arising under Article 8 (art. 8) in this case is to what extent, if at all, the maintenance in force of the legislation is "necessary in a democratic society" for these aims.

49. There can be no denial that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified as "necessary in a democratic society". The overall function served by the criminal law in this field is, in the words of the Wolfenden report (see paragraph 17 above), "to preserve public order and decency [and] to protect the citizen from what is offensive or injurious". Furthermore, this necessity for some degree of control may even extend to consensual acts committed in private, notably where there is call - to quote the Wolfenden report once more - "to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence". In practice there is legislation on the matter in all the member States of the Council of Europe, but what distinguishes the law in Northern Ireland from that existing in the great majority of the member States is that it prohibits generally gross indecency between males and buggery whatever the circumstances. It being accepted that some form of legislation is "necessary" to protect particular sections of society as well as the moral ethos of society as a whole, the question in the present case is whether the contested provisions of the law of Northern Ireland and their enforcement remain within the bounds of what, in a democratic society, may be regarded as necessary in order to accomplish those aims.

50. A number of principles relevant to the assessment of the "necessity", "in a democratic society", of a measure taken in furtherance of an aim that is legitimate under the Convention have been stated by the Court in previous judgments.

51. Firstly, "necessary" in this context does not have the flexibility of such expressions as "useful", "reasonable", or "desirable", but implies the existence of a "pressing social need" for the interference in question (see the above-mentioned Handyside judgment, p. 22, par. 48).

52. In the second place, it is for the national authorities to make the initial assessment of the pressing social need in each case; accordingly, a margin of appreciation is left to them (ibid). However, their decision remains subject to review by the Court (ibid., p. 23, par. 49).

As was illustrated by the Sunday Times judgment, the scope of the margin of appreciation is not identical in respect of each of the aims justifying restrictions on a right (p. 36, par. 59). The Government inferred from the Handyside judgment that the margin of appreciation will be more extensive where the protection of morals is in issue. It is an indisputable fact, as the Court stated in the Handyside judgment, that "the view taken ... of the requirements of morals varies from time to time and from place to place, especially in our era," and that "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements" (p. 22, par. 48).

However, not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8 (art. 8-2).

53. Finally, in Article 8 (art. 8) as in several other Articles of the Convention, the notion of "necessity" is linked to that of a "democratic society". According to the Court’s case-law, a restriction on a Convention right cannot be regarded as "necessary in a democratic society" - two hallmarks of which are tolerance and broadmindedness - unless, amongst other things, it is proportionate to the legitimate aim pursued (see the above-mentioned Handyside judgment, p. 23, par. 49, and the above-mentioned Young, James and Webster judgment, p. 25, par. 63).

54. The Court’s task is to determine on the basis of the aforesaid principles whether the reasons purporting to justify the "interference" in question are relevant and sufficient under Article 8 par. 2 (art. 8-2) (see the above-mentioned Handyside judgment, pp. 23-24, par. 50). The Court is not concerned with making any value-judgment as to the morality of homosexual relations between adult males.

55. It is convenient to begin by examining the reasons set out by the Government in their arguments contesting the Commission’s conclusion that the penal prohibition of private consensual homosexual acts involving male persons over 21 years of age is not justified under Article 8 par. 2 (art. 8-2) (see paragraph 35 above).

56. In the first place, the Government drew attention to what they described as profound differences of attitude and public opinion between Northern Ireland and Great Britain in relation to questions of morality. Northern Irish society was said to be more conservative and to place greater emphasis on religious factors, as was illustrated by more restrictive laws even in the field of heterosexual conduct (see paragraph 15 above).

Although the applicant qualified this account of the facts as grossly exaggerated, the Court acknowledges that such differences do exist to a

certain extent and are a relevant factor. As the Government and the Commission both emphasised, in assessing the requirements of the protection of morals in Northern Ireland, the contested measures must be seen in the context of Northern Irish society.

The fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland (see, mutatis mutandis, the above-mentioned Sunday Times judgment, pp. 37-38, par. 61; cf. also the above-mentioned Handyside judgment, pp. 26-28, par. 54 and 57). Where there are disparate cultural communities residing within the same State, it may well be that different requirement, both moral and social, will face the governing authorities.

57. As the Government correctly submitted, it follows that the moral climate in Northern Ireland in sexual matters, in particular as evidenced by the opposition to the proposed legislative change, is one of the matters which the national authorities may legitimately take into account in exercising their discretion. There is, the Court accepts, a strong body of opposition stemming from a genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law would be seriously damaging to the moral fabric of society (see paragraph 25 above). This opposition reflects - as do in another way the recommendations made in 1977 by the Advisory Commission (see paragraph 23 above - a view both of the requirements of morals in Northern Ireland and of the measures thought within the community to be necessary to preserve prevailing moral standards.

Whether this point of view be right or wrong, and although it may be out of line with current attitudes in other communities, its existence among an important sector of Northern Irish society is certainly relevant for the purposes of Article 8 par. 2 (art. 8-2).

58. The Government argued that this conclusion is further strengthened by the special constitutional circumstances of Northern Ireland (described above at paragraphs 19 and 20). In the period between 1921 (when the Northern Ireland Parliament first met) and 1972 (when it last sat), legislation in the social field was regarded as a devolved matter within the exclusive domain of that Parliament. As a result of the introduction of "direct rule" from Westminster, the United Kingdom Government, it was said, had a special responsibility to take full account of the wishes of the people of Northern Ireland before legislating on such matters.

In the present circumstances of direct rule, the need for caution and for sensitivity to public opinion in Northern Ireland is evident. However, the Court does not consider it conclusive in assessing the "necessity", for the purposes of the Convention, of maintaining the impugned legislation that the decision was taken, not by the former Northern Ireland Government and

Parliament, but by the United Kingdom authorities during what they hope to be an interim period of direct rule.

59. Without any doubt, faced with these various considerations, the United Kingdom Government acted carefully and in good faith; what is more, they made every effort to arrive at a balanced judgment between the differing viewpoints before reaching the conclusion that such a substantial body of opinion in Northern Ireland was opposed to a change in the law that no further action should be taken (see, for example, paragraphs 24 and 26 above). Nevertheless, this cannot of itself be decisive as to the necessity for the interference with the applicant's private life resulting from the measures being challenged (see the above-mentioned Sunday Times judgment, p. 36, par. 59). Notwithstanding the margin of appreciation left to the national authorities, it is for the Court to make the final evaluation as to whether the reasons it has found to be relevant were sufficient in the circumstances, in particular whether the interference complained of was proportionate to the social need claimed for it (see paragraph 53 above).

60. The Government right affected by the impugned legislation protects an essentially private manifestation of the human personality (see paragraph 52, third sub-paragraph, above).

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States (see, mutatis mutandis, the above-mentioned Marckx judgment, p. 19, par. 41, and the Tyrer judgment of 25 April 1978, Series A no. 26, pp. 15-16, par. 31). In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent (see paragraph 30 above). No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.

It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may

be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.

61. Accordingly, the reasons given by the Government, although relevant, are not sufficient to justify the maintenance in force of the impugned legislation in so far as it has the general effect of criminalising private homosexual relations between adult males capable of valid consent. In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent. "Decriminalisation" does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.

To sum up, the restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved.

62. In the opinion of the Commission, the interference complained of by the applicant can, in so far as he is prevented from having sexual relations with young males under 21 years of age, be justified as necessary for the protection of the rights of others (see especially paragraphs 105 and 116 of the report). This conclusion was accepted and adopted by the Government, but disputed by the applicant who submitted that the age of consent for male homosexual relations should be the same as that for heterosexual and female homosexual relations that is, 17 years under current Northern Ireland law (see paragraph 15 above).

The Court has already acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth (see paragraph 49 above). However, it falls in the first instance to the national authorities to decide on the appropriate safeguards of this kind required for the defence of morals in their society and, in particular, to fix the age under which young people should have the protection of the criminal law (see paragraph 52 above).

D. Conclusion

63. Mr. Dudgeon has suffered and continues to suffer an unjustified interference with his right to respect for his private life. There is accordingly a breach of Article 8 (art. 8).

II. THE ALLEGED BREACH OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8 (art. 14+8)

64. Article 14 (art. 14) reads as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association, with a national minority, property, birth or other status."

65. The applicant claimed to be a victim of discrimination in breach of Article 14 taken in conjunction with Article 8 (art. 14+8), in that he is subject under the criminal law complained of to greater interference with his private life than are male homosexuals in other parts of the United Kingdom and heterosexuals and female homosexuals in Northern Ireland itself. In particular, in his submission Article 14 (art. 14) requires that the age of consent should be the same for all forms of sexual relations.

66. When dealing with the issues under Article 14 (art. 14), the Commission and likewise the Government distinguished between male homosexual acts involving those under and those over 21 years of age.

The Court has already held in relation to Article 8 (art. 8) that it falls in the first instance to the national authorities to fix the age under which young people should have the protection of the criminal law (see paragraph 62 above). The current law in Northern Ireland is silent in this respect as regards the male homosexual acts which it prohibits. It is only once this age has been fixed that an issue under Article 14 (art. 14) might arise; it is not for the Court to pronounce upon an issue which does not arise at the present moment.

67. Where a substantive Article of the Convention has been invoked both on its own and together with Article 14 (art. 14) and a separate breach has been found of the substantive Article, it is not generally necessary for the Court also to examine the case under Article 14 (art. 14), though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (see the Airey judgment of 9 October 1979, Series A no. 32 p. 16, par. 30).

68. This latter condition is not fulfilled as regards the alleged discrimination resulting from the existence of different laws concerning male homosexual acts in various parts of the United Kingdom (see paragraphs 14, 17 and 18 above). Moreover, Mr. Dudgeon himself conceded that, if the Court were to find a breach of Article 8 (art. 8), then this particular question would cease to have the same importance.

69. According to the applicant, the essential aspect of his complaint under Article 14 (art. 14) is that in Northern Ireland male homosexual acts, in contrast to heterosexual and female homosexual acts, are the object of criminal sanctions even when committed in private between consenting adults.

The central issue in the present case does indeed reside in the existence in Northern Ireland of legislation which makes certain homosexual acts punishable under the criminal law in all circumstances. Nevertheless, this aspect of the applicant's complaint under Article 14 (art. 14) amounts in effect to the same complaint, albeit seen from a different angle, that the Court has already considered in relation to Article 8 (art. 8); there is no call to rule on the merits of a particular issue which is part of and absorbed by a wider issue (see, mutatis mutandis, the Deweer judgment of 27 February 1980, Series A no. 35, pp. 30-31, par. 56 in fine). Once it has been held that the restriction on the applicant's right to respect for his private sexual life give rise to a breach of Article 8 (art. 8) by reason of its breadth and absolute character (see paragraph 61 in fine above), there is no useful legal purpose to be served in determining whether he has in addition suffered discrimination as compared with other persons who are subject to lesser limitations on the same right. This being so, it cannot be said that a clear inequality of treatment remains a fundamental aspect of the case.

70. The Court accordingly does not deem it necessary to examine the case under Article 14 (art. 14) as well.

III. THE APPLICATION OF ARTICLE 50 (art. 50)

71. Counsel for the applicant stated that, should the Court find the Convention to have been violated, his client would seek just satisfaction under Article 50 (art. 50) in respect of three matters: firstly, the distress, suffering and anxiety resulting from the police investigation in January 1976; secondly, the general fear and distress suffered by Mr. Dudgeon since he was 17 years of age; and finally, legal and other expenses. Counsel put forward figures of 5,000 pounds under the first head, 10,000 pounds under the second and 5,000 pounds under the third.

The Government, for their part, asked the Court to reserve the question.

72. Consequently, although it was raised under Rule 47 bis of the Rules of Court, this question is not ready for decision and must be reserved; in the circumstances of the case, the Court considers that the matter should be referred back to the Chamber in accordance with Rule 50 par. 4 of the Rules of Court.

FOR THE REASONS, THE COURT

1. Holds by fifteen votes to four that there is a breach of Article 8 (art. 8) of the Convention;

2. Holds by fourteen votes to five that it is not necessary also to examine the case under Article 14 taken in conjunction with Article 8 (art. 14+8);

3. Holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision;
(a) accordingly reserves the whole of the said question;
(b) refers the said question back to the Chamber under Rule 50 par. 4 of the Rules of Court.

Done in English and in French, the English text being authentic, at the Human Rights Building, Strasbourg, this twenty-second day of October, one thousand nine hundred and eighty-one.

For the President
John CREMONA
Judge

Marc-André EISSEN
Registrar

The following separate opinions are annexed to the present judgment in accordance with Article 51 par. 2 (art. 51-2) of the Convention and Rule 50 par. 2 of the Rules of Court:

- dissenting opinion of Mr. Zekia;

- dissenting opinion of Mr. Evrigenis and Mr. García de Enterría;

- dissenting opinion of Mr. Matscher;

- dissenting opinion of Mr. Pinheiro Farinha;

- partially dissenting opinion of Mr. Walsh.

J. C.
M.-A.E.

DISSENTING OPINION OF JUDGE ZEKIA

I am dealing only with the crucial point which led the Court to find a breach of Article 8 § 1 (art. 8-1) of the Convention by the respondent Government.

The Acts of 1861 and 1885 still in force in Northern Ireland prohibit gross indecency between males and buggery. These enactments in their unamended form are found to interfere with the right to respect for the private life of the applicant, admittedly a homosexual.

The decisive central issue in this case is therefore whether the provisions of the aforesaid laws criminalising homosexual relations were necessary in a democratic society for the protection of morals and for the protection of the rights and freedoms of others, such a necessity being a prerequisite for the validity of the enactment under Article 8 § 2 (art. 8-2) of the Convention.

After taking all relevant facts and submissions made in this case into consideration, I have arrived at a conclusion opposite to the one of the majority. I proceed to give my reasons as briefly as possible for finding no violation on the part of the respondent Government in this case.

1. Christian and Moslem religions are all united in the condemnation of homosexual relations and of sodomy. Moral conceptions to a great degree are rooted in religious beliefs.

2. All civilised countries until recent years penalised sodomy and buggery and akin unnatural practices.

In Cyprus criminal provisions similar to those embodied in the Acts of 1861 and 1885 in the North of Ireland are in force. Section 171 of the Cyprus Criminal Code, Cap. 154, which was enacted in 1929, reads:

> "Any person who (a) has carnal knowledge of any person against the order of nature, or (b) permits a male person to have carnal knowledge of him against the order of nature is guilty of a felony and is liable to imprisonment for five years."

Under section 173, anyone who attempts to commit such an offence is liable to 3 years' imprisonment.

While on the one hand I may be thought biased for being a Cypriot Judge, on the other hand I may be considered to be in a better position in forecasting the public outcry and the turmoil which would ensue if such laws are repealed or amended in favour of homosexuals either in Cyprus or in Northern Ireland. Both countries are religious-minded and adhere to moral standards which are centuries' old.

3. While considering the respect due to the private life of a homosexual under Article 8 § 1 (art. 8-1), we must not forget and must bear in mind that respect is also due to the people holding the opposite view, especially in a country populated by a great majority of such people who are completely against unnatural immoral practices. Surely the majority in a democratic society are also entitled under Articles 8, 9 and 10 (art. 8, art. 9, art. 10) of the Convention and Article 2 of Protocol No. 1 (P1-2) to respect for their

religious and moral beliefs and entitled to teach and bring up their children consistently with their own religious and philosophical convictions.

A democratic society is governed by the rule of the majority. It seems to me somewhat odd and perplexing, in considering the necessity of respect for one's private life, to underestimate the necessity of keeping a law in force for the protection of morals held in high esteem by the majority of people.

A change of the law so as to legalise homosexual activities in private by adults is very likely to cause many disturbances in the country in question. The respondent Government were justified in finding it necessary to keep the relevant Acts on the statute book for the protection of morals as well as for the preservation of public peace.

4. If a homosexual claims to be a sufferer because of physiological, psychological or other reasons and the law ignores such circumstances, his case might then be one of exculpation or mitigation if his tendencies are curable or incurable. Neither of these arguments has been put forward or contested. Had the applicant done so, then his domestic remedies ought to have been exhausted. In fact he has not been prosecuted for any offence.

From the proceedings in this case it is evident that what the applicant is claiming by virtue of Article 8 §§ 1 and 2 (art. 8-1, art. 8-2) of the European Convention is to be free to indulge privately into homosexual relations.

Much has been said about the scarcity of cases coming to court under the prohibitive provisions of the Acts we are discussing. It was contended that this fact indicates the indifference of the people in Northern Ireland to the non-prosecution of homosexual offences committed. The same fact, however, might indicate the rarity of homosexual offences having been perpetrated and also the unnecessariness and the inexpediency of changing the law.

5. In ascertaining the nature and scope of morals and the degree of the necessity commensurate to the protection of such morals in relation to a national law, adverted to in Articles 8, 9 and 10 (art. 8, art. 9, art. 10) of the European Convention on Human Rights, the jurisprudence of this Court has already provided us with guidelines:

> "A" The conception of morals changes from time to time and from place to place. There is no uniform European conception of morals. State authorities of each country are in a better position than an international judge to give an opinion as to the prevailing standards of morals in their country. (Handyside judgment of 7 December 1976, Series A no. 24, p. 22, § 48)

It cannot be disputed that the moral climate obtaining in Northern Ireland is against the alteration of the law under consideration, the effect of which alteration, if made, would be in some way or other to license immorality.

> "B" State authorities likewise are in a better position to assess the extent to which the national legislation should necessarily go in restricting, for the protection of morals and of the rights of others, rights secured under the relevant Articles of the Convention.

The legislative assembly competent to alter the laws under review refrained to do so, believing it to be necessary to maintain them for the protection of morals prevailing in the region and for keeping the peace. The Contracting States are entitled to a margin of appreciation, although undoubtedly not an unlimited one.

Taking account of all relevant facts and points of law and the underlying principles for an overall assessment of the situation under consideration, I fail to find that the keeping in force in Northern Ireland of Acts - which date from the last century - prohibiting gross indecency and buggery between male adults has become unnecessary for the protection of morals and of the rights of others in that country. I have come to the conclusion therefore that the respondent Government did not violate the Convention.

DISSENTING OPINION OF JUDGES EVRIGENIS AND GARCIA DE ENTERRIA

(Translation)

Being of the opinion that the case should also have been examined under Article 14 read in conjunction with Article 8 (art. 14+8), but without prejudging our position on the merits of the matter, we have felt compelled to vote against point no. 2 in the operative provisions of the judgment for the following reasons:

At least the difference of treatment in Northern Ireland between male homosexuals and female homosexuals and between male homosexuals and heterosexuals (see paragraphs 65 and 69 of the judgment) - a difference in treatment relied on in argument by the applicant - ought to have been examined under Article 14 read in conjunction with Article 8 (art. 14+8). Even accepting the restrictive formula enunciated by the Court in the Airey judgment and applied in the judgment in the present case (at paragraph 67: "a clear inequality of treatment" being "a fundamental aspect of the case"), it would be difficult to assert that these conditions were not plainly satisfied in the circumstances. In any event, to interpret Article 14 (art. 14) in the restrictive manner heralded in the Airey judgment deprives this fundamental provision in great part of its substance and function in the system of substantive rules established under the Convention.

DISSENTING OPINION OF JUDGE MATSCHER

(Translation)

I. As concerns the alleged interference with an article 8 (art. 8) right

Although I agree with the general tenor of the Court's reasoning, I take a somewhat different view of the facts of the case. As a result, I am unable to concur with the conclusions of the judgment on the issue of a violation of Article 8 (art. 8) of the Convention. I will therefore endeavour to set out my views below.

Article 8 (art. 8) does not at all require that the State should consider homosexuality - in whatever form it may be manifested - as an alternative that is equivalent to heterosexuality and that, in consequence, its laws should treat each of them on the same footing. Indeed, the judgment quite rightly adverts to this point on several occasions.

On the other hand, it does not follow from the above that the criminal prosecution of homosexual acts committed in private between consenting adults (leaving aside certain special situations as, for example, where there has been abuse of a state of dependence or where the acts occur in certain contexts of communal living such as a boarding school, barracks, etc.) is "necessary", within the meaning of Article 8 § 2 (art. 8-2), for the protection of those values which a given society legitimately (likewise for the purposes of the Convention) wishes to preserve. I therefore agree with the general tenor of the reasoning in the judgment as regards the interpretation to be given to Article 8 (art. 8), and in particular to paragraph 2 of that Article (art. 8-2), in the present case.

In this connection, however, there are two arguments to which I cannot subscribe.

At paragraph 51, it is said that the adjective "necessary" implies the existence of a "pressing social need" for the interference in question (reference to the Handyside judgment of 7 December 1976, Series A no. 24, § 48). To my mind, however, once it has been granted that an aim is legitimate for the purposes of Article 8 § 2 (art. 8-2), any measure directed towards the accomplishment of that aim is necessary if failure to take the measure would create a risk that that aim would not be achieved. It is only in this context that one can examine the necessity for a certain measure and, adding a further factor, the proportionality between the value attaching to the aim and the seriousness of the measure (see paragraphs 54 and 60 in fine). Since the adjective "necessary" thus refers solely to the measures (that is, the means), it does not permit an assessment whether the aim itself is legitimate, something that the judgment appears to do when it links "necessary" with "pressing social need".

Furthermore, according to paragraph 60, second sub-paragraph, no evidence has been adduced to show that the attitude of tolerance adopted in practice by the Northern Ireland authorities has been injurious to moral standards in the region. I cannot but regard this as a purely speculative argument, devoid of any foundation and which thus has no probative value whatsoever.

My disagreement relates in the first place to the evaluation made of the legal provisions and the measures of implementation of which the applicant complains to have been a victim in concreto and to be still a potential victim by reason of the existence of the impugned legislation.

(a) The Government asserted that for a long time (to be precise, between 1972 and 1980) there have been no criminal prosecutions in circumstances corresponding to those of the present case. No one contradicted this assertion which, moreover, would more than appear to be a correct statement of the reality. It is true that at common law a prosecution could also be brought by a private individual, subject to the Director of Public Prosecutions' power to discontinue the proceedings. However, here again there have been no examples of prosecutions of this kind during the period in question (paragraphs 29-30).

I conclude from this that in practice there are no prosecutions for homosexual acts committed in private between consenting adults. The absence of any form of persecution seems to be well established by the existence of a number of associations (the Commission lists at least five in paragraph 30 of its report) - the applicant being the Secretary of one of them - which pursue their activities hardly in secret but more or less without any constraint and are, amongst other things, engaged in conducting a campaign for the legalisation of homosexuality, and some of whose members, if not the majority, openly profess - it may be supposed - homosexual tendencies.

In these circumstances, the existence of "fear, suffering and psychological distress" experienced by the applicant as a direct result of the laws in force - something which the Commission and the Court saw no reason to doubt (paragraphs 40-41) – seems to me, on the contrary, to be extremely unlikely.

To sum up, I believe that it is not the letter of the law that has to be taken into account, but the actual situation obtaining in Northern Ireland, that is to say, the attitude in fact adopted for at least ten years by the competent authorities in respect of male homosexuality.

The situation is therefore fundamentally different from that in the Marckx case (paragraph 27 of the judgment of 13 June 1979, Series A no. 31) to which the present judgment refers (in paragraph 41): in the former case, the provisions of Belgian civil law complained of applied directly to the applicant who suffered their consequences in her family life; in the instant case, the legislation complained of is formally in force but as a matter of fact it is not applied as regards those of its aspects which are being

attacked. This being so, the applicant and those like him can organise their private life as they choose without any interference on the part of the authorities.

Of course, the applicant and the organisations behind him are seeking more: they are seeking the express and formal repeal of the laws in force, that is to say a "charter" declaring homosexuality to be an alternative equivalent to heterosexuality, with all the consequences that that would entail (for example, as regards sex education). However, this is in no way required by Article 8 (art. 8) of the Convention.

(b) The police action on 21 January 1976 (paragraphs 30-31) against the applicant can also be seen in a different light: in the particular circumstances, the police were executing a warrant under the Misuse of Drugs Act 1971. During the search, the police found papers providing evidence of his homosexual tendencies. The reason why the police pursued their enquiries was probably also to investigate whether the applicant did not have homosexual relations with minors as well. Indeed, it is well known that this is a widespread tendency in homosexual circles and the fact that the applicant himself was engaged in a campaign for the lowering of the legal age of consent points in the same direction; furthermore, the enquiries in question took place in the context of a more extensive operation on the part of the police, the purpose of which was to trace a minor who was missing from home and believed to be associating with homosexuals (see on this point the reply of the Government to question 8, document Court (81) 32). Furthermore, the file on the case was closed by the competent judicial authorities.

This overall evaluation of the facts leads me to the view that the applicant cannot claim to be the victim of an interference with his private life. For this reason I conclude that there has not been a violation of Article 8 (art. 8) of the Convention in the present case.

II. As concerns the alleged breach of article 14 read in conjunction with article 8 (art. 14+8)

The applicant alleged a breach of Article 14 read in conjunction with Article 8 (art. 14+8) on three (or even four) counts: (a) the existence of different laws in the different parts of the United Kingdom; (b) distinctions drawn in respect of the age of consent; (c) and (d) differences of treatment under the criminal law between male homosexuality and female homosexuality and between homosexuality and heterosexuality.

As far as the age of consent is concerned ((b)), the Court rightly notes (at paragraph 66, second sub-paragraph) that this is a matter to be fixed in the first instance by the national authorities. The reasoning of the majority of the Court runs as follows: male homosexuality is made punishable under the criminal law in Northern Ireland without any distinction as to the age of the

persons involved; consequently, it is only once this age has been fixed that an issue under Article 14 (art. 14) might arise. This reasoning is coherent and there is nothing to add.

To my mind, the competent authorities do in fact draw a distinction according to age and exhibit tolerance only in relation to homosexuality between consenting adults. I find that, for reasons whose obviousness renders any explanation superfluous, this differentiation is perfectly legitimate for the purposes of Article 14 (art. 14) and thus gives rise to no discrimination.

As regards the other complaints ((a), (c) and (d)), the majority of the Court state that when a separate breach of a substantive Article of the Convention has been found, there is generally no need for the Court also to examine the case under Article 14 (art. 14); the position is otherwise only if a clear inequality of treatment in the enjoyment of the right at issue is a fundamental aspect of the case (reference to the Airey judgment of 9 October 1979, Series A no. 32, paragraph 30). This latter condition is said not be fulfilled in the circumstances. Furthermore, the judgment continues, there is no call to rule on the merits of a particular issue which is part of and absorbed by a wider issue (reference to the Deweer judgment of 27 February 1980, Series A no. 35, paragraph 56 in fine), this being the position in the present case. In these conditions, there appeared to the majority to be no useful legal purpose to be served in determining whether the applicant has in addition suffered discrimination as compared with other persons subject to lesser limitations on the same right.

I regret that I do not feel able to agree with this line of reasoning. In my view, when the Court is called on to rule on a breach of the Convention which has been alleged by the applicant and contested by the respondent Government, it is the Court’s duty, provided that the application is admissible, to decide the point by giving an answer on the merits of the issue that has been raised. The Court cannot escape this responsibility by employing formulas that are liable to limit excessively the scope of Article 14 (art. 14) to the point of depriving it of all practical value.

Admittedly, there are extreme situations where an existing difference of treatment is so minimal that it entails no real prejudice, physical or moral, for the persons concerned. In that event, no discrimination within the meaning of Article 14 (art. 14) could be discerned, even if on occasions it might be difficult to produce an objective and rational explanation for the difference of treatment. It is only in such conditions that, in my opinion, the maxim "de minimis non curat praetor" would be admissible (see, mutatis mutandis, my separate opinion appended to the Marckx judgment, p. 58). I do not, however, find these conditions satisfied in the present case, with the result that a definite position must be taken regarding the alleged violation of Article 14 (art. 14) in relation to the complaints made by the applicant.

(a) The diversity of domestic laws, which is characteristic of a federal State, can in itself never constitute a discrimination, and there is no necessity to justify diversity of this kind. To claim the contrary would be to disregard totally the very essence of federalism.

(c) and (d) The difference of character between homosexual conduct and heterosexual conduct seems obvious, and the moral and social problems to which they give rise are not at all the same. Similarly, there exists a genuine difference, of character as well as of degree, between the moral and social problems raised by the two forms of homosexuality, male and female. The differing treatment given to them under the criminal law is thus founded, to my mind, on clearly objective justifications.

Accordingly, I come to the conclusion that there has been no breach of Article 14 read in conjunction with Article 8 (art. 14+8) in respect of any of the heads of complaint relied on by the applicant.

DISSENTING OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

I am unable to agree with the views and conclusions expressed in the present case by my eminent colleagues as regards the breach by the United Kingdom of Article 8 (art. 8) of the Convention.

In my opinion, there was no victim and the Court does not have jurisdiction to take cognisance of a breach alleged by someone who is not a victim.

The action by the police was decided on (paragraph 33) in implementation of the Misuse of Drugs Act 1971 and not with a view to taking action under the criminal law against homosexuality.

The police investigation "took place in the context of a more extensive operation on the part of the police, the object of which was to trace a minor who was missing from home and believed to be associating with homosexuals" (dissenting opinion of Judge Matscher) and it did not lead to any criminal prosecution being brought (paragraph 41).

The file on the case was closed by the prosecuting authorities, despite the fact that the applicant was the secretary of an organisation campaigning for the legalisation of homosexuality and notwithstanding the proof of his homosexual tendencies.

I come to the conclusion that because the legislation was not enforced against him and is applicable not directly but only after a concrete decision by the authorities, the applicant was not a victim.

There being no victim, the conclusion must be that there was no breach of Article 8 (art. 8) or of Article 14 taken together with Article 8 (art. 14+8).

I would further emphasise that "there can be no denial that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, can be justified as ‘necessary in a democratic society’", and that "this necessity for some degree of control may even extend to consensual acts committed in private" (paragraph 49).

PARTIALLY DISSENTING OPINION OF JUDGE WALSH

Is the applicant a "victim" within the meaning of Article 25 (art. 25)?

1. The law of Northern Ireland does not make homosexuality a crime nor does it make all homosexual activities criminal. The 1885 Act is the only one of the two legislative provisions attacked in these present proceedings that can be described as dealing solely with homosexual activities. The Act of 1885 makes criminal the commission of acts of gross indecency between male persons whether in private or in public. The provisions of the Act of 1861 which is also impugned by the applicant applies equally to heterosexual activities and homosexual activities. The applicant's complaint is directed only towards the application of the provision of the 1861 Act to homosexual activities of the type mentioned in the section impugned. Of these, the Court is in reality concerned with but one, namely sodomy between male persons.

2. The Act of 1885 does not specifically designate any particular acts of gross indecency but simply prohibits "gross indecency". Acts of indecency between male persons are not per se criminal offences but only such of them as amount to "gross indecency". What particular acts in any given case may be held to amount to gross indecency is a matter for the court, which means in effect the jury, to decide on the particular facts of each case.

3. The applicant did not claim that he had at any time indulged in any of the activities prohibited either by the law of 1861 or by the law of 1885, nor has he stated that he desires to indulge in them or that he intends to do so. In effect his case is that if he should choose to engage in any of the prohibited activities the effect of the law, if enforced, would be to violate the protection of his private life which is guaranteed by Article 8 (art. 8) of the Convention. In fact no action has been taken against him by the authorities under either of the legislative provisions referred to.

4. It is true that the police displayed an interest in the question of whether or not he had indulged in homosexual activities. It is not known to the Court whether or not the activities in question constituted offences under either of the impugned legislative provisions. The documentary material which gave rise to this police interest came to light during the execution by the police of a search warrant issued pursuant to the laws which prohibit the misuse of drugs. The applicant was requested to accompany the police to the police station for the purpose, inter alia, of continuing inquiries into his suspected homosexual activities. The applicant voluntarily agreed to go to the police station. If he had been brought there against his will solely for the purpose of being interrogated about his alleged homosexual activities, he would have been the victim of false imprisonment and under the law of Northern Ireland he would have had an action for damages in the ordinary civil

courts. So far as is disclosed by the evidence in the application, no such action has ever been brought or contemplated and it has not been suggested that the applicant's visit to the police station was other than purely voluntary. It is common case that at the police station he was informed by the police that he was under no obligation to answer any questions or to make any statement. Notwithstanding this, the applicant voluntarily made a statement the contents of which have not been disclosed to the Court. The Court does not know whether the statement was incriminatory or exculpatory. No prosecution was ever instituted against the applicant either by the police or by the Director of Public Prosecutions in respect of any alleged illegal homosexual activities.

No question of the privacy of the applicant's home being invaded arises as the entry to his house was carried out under a valid search warrant dealing with the abuse of drugs and no complaint has been made about the warrant or the entry. Some personal papers, including correspondence and diaries belonging to the applicant in which were described homosexual activities, were taken away by the police. The Court has not been informed whether the papers were irrelevant to the suspected drug offences being investigated and in respect of which there has been no complaint.

5. It is clear that the applicant's case is more in the nature of a "class action". In so far as he is personally concerned, it scarcely amounts to a quia timet action. Having suffered no prosecution himself he is in effect asking the Court to strike down two legislative provisions of a member State. The Court has no jurisdiction of a declaratory character in this area unrelated to an injury actually suffered or alleged to have been suffered by the applicant. In my view, if the Court were to undertake any such competence in cases where the applicant has neither been a victim nor is imminently to be a victim, the consequences would be far-reaching in every member State.

6. In my opinion the applicant has not established that he is a victim within the meaning of Article 25 (art. 25) of the Convention and he is therefore not entitled to the ruling he seeks.

Alleged breach of Article 8 (art. 8)

7. If the applicant is to be regarded as being a victim within the meaning of Article 25 (art. 25), then the applicability of Article 8 (art. 8) to his case falls to be considered.

Paragraph 1 of Article 8 (art. 8-1) provides that "everyone has the right to respect for his private and family life, his home and his correspondence". There is no suggestion that any point relating to family life arises in this case. Therefore the complaint is in reality one to a claim of right to indulge in any homosexual activities in the course of his private life and, presumably, in private.

8. The first matter to consider is the meaning of paragraph 1 of Article 8 (art. 8-1). Perhaps the best and most succinct legal definition of privacy is that given by Warren and Brandeis – it is "the right to be let alone". The

question is whether under Article 8 § 1 (art. 8-1), the right to respect for one's private life is to be construed as being an absolute right irrespective of the nature of the activity which is carried on as part of the private life and no interference with this right under any circumstances is permitted save within the terms of paragraph 2 of Article 8 (art. 8-2). This appears to be the interpretation put upon it by the Court in its judgment.

It is not essentially different to describe the "private life" protected by Article 8 § 1 (art. 8-1) as being confined to the private manifestation of the human personality. In any given case the human personality in question may in private life manifest dangerous or evil tendencies calculated to produce ill-effects upon himself or upon others. The Court does not appear to consider as a material factor that the manifestation in question may involve more than one person or participation by more than one person provided the manifestation can be characterised as an act of private life. If for the purposes of this case this assumption is to be accepted, one proceeds to the question of whether or not the interference complained of can be justified under paragraph 2 (art. 8-2). This in turn begs the question that under Article 8 (art. 8) the inseparable social dimensions of private life or "private morality" are limited to the confines of paragraph 2 of Article 8 (art. 8-2). It is beyond question that the interference, if there was such, was in accordance with the law. The question posed by paragraph 2 (art. 8-2) is whether the interference permitted by the law is necessary in a democratic society in the interests of the protection of health or morals or the rights and freedoms of others.

9. This raises the age-old philosophical question of what is the purpose of law. Is there a realm of morality which is not the law's business or is the law properly concerned with moral principles? In the context of United Kingdom jurisprudence and the true philosophy of law this debate in modern times has been between Professor H. L. A. Hart and Lord Devlin. Generally speaking the former accepts the philosophy propounded in the last century by John Stuart Mill while the latter contends that morality is properly the concern of the law. Lord Devlin argues that as the law exists for the protection of society it must not only protect the individual from injury, corruption and exploitation but it

> "must protect also the institutions and the community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies".

He claims that the criminal law of England not only "has from the very first concerned itself with moral principles but continues to concern itself with moral principles". Among the offences which he pointed to as having been brought within the criminal law on the basis of moral principle, notwithstanding that it could be argued that they do not endanger the public, were euthanasia, the killing of another at his own request, suicide pacts,

duelling, abortion, incest between brother and sister. These are acts which he viewed as ones which could be done in private and without offence to others and need not involve the corruption or exploitation of others. Yet, as he pointed out, no one has gone so far as to suggest that they should all be left outside the criminal law as matters of private morality.

10. It would appear that the United Kingdom does claim that in principle it can legislate against immorality. In modern United Kingdom legislation a number of penal statutes appear to be based upon moral principles and the function of these penal sanctions is to enforce moral principles. Cruelty to animals is illegal because of a moral condemnation of enjoyment derived from the infliction of pain upon sentient creatures. The laws restricting or preventing gambling are concerned with the ethical significance of gambling which is confined to the effect that it may have on the character of the gambler as a member of society. The legislation against racial discrimination has as its object the shaping of people's moral thinking by legal sanctions and the changing of human behaviour by having the authority to punish.

11. The opposite view, traceable in English jurisprudence to John Stuart Mill, is that the law should not intervene in matters of private moral conduct more than necessary to preserve public order and to protect citizens against what is injurious and offensive and that there is a sphere of moral conduct which is best left to individual conscience just as if it were equitable to liberty of thought or belief. The recommendations of the Wolfenden Committee relied partly upon this view to favour the non-intervention of the law in case of homosexual activities between consenting adult males. On this aspect of the matter the Wolfenden Committee stated:

> "There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice in action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality."

This aspect of the Wofenden Committee's report apparently commends itself to the Court (see paragraphs 60 and 61 of the judgment).

12. The Court also agrees with the conclusion in the Wolfenden Report to the effect that there is a necessity for some degree of control even in respect of consensual acts committed in private notably where there is a call "to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence" (paragraph 49 of the judgment). Furthermore, the Court accepts that some form of legislation is necessary to protect not only particular sections of society but also the moral ethos of

society as a whole (ibid.). However, experience has shown that exploitation and corruption of others is not confined to persons who are young, weak in body or mind or inexperienced or in a state of physical, moral or economic dependence.

13. The fact that a person consents to take part in the commission of homosexual acts is not proof that such person is sexually orientated by nature in that direction. A distinction must be drawn between homosexuals who are such because of some kind of innate instinct or pathological constitution judged to be incurable and those whose tendency comes from a lack of normal sexual development or from habit or from experience or from other similar causes but whose tendency is not incurable. So far as the incurable category is concerned, the activities must be regarded as abnormalities or even as handicaps and treated with the compassion and tolerance which is required to prevent those persons from being victimised in respect of tendencies over which they have no control and for which they are not personally responsible. However, other considerations are raised when these tendencies are translated into activities. The corruption for which the Court acknowledges need for control and the protection of the moral ethos of the community referred to by the Court may be closely associated with the translation of such tendencies into activities. Even assuming one of the two persons involved has the incurable tendency, the other may not. It is known that many male persons who are heterosexual or pansexual indulge in these activities not because of any incurable tendency but for sexual excitement. However, it is to be acknowledged that the case for the applicant was argued on the basis of the position of a male person who is by nature homosexually predisposed or orientated. The Court, in the absence of evidence to the contrary, has accepted this as the basis of the applicant's case and in its judgment rules only in respect of males who are so homosexually orientated (see, for example, paragraphs 32, 41 and 60 of the judgment).

14. If it is accepted that the State has a valid interest in the prevention of corruption and in the preservation of the moral ethos of its society, then the State has a right to enact such laws as it may reasonably think necessary to achieve these objects. The rule of law itself depends on a moral consensus in the community and in a democracy the law cannot afford to ignore the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt. Virtue cannot be legislated into existence but non-virtue can be if the legislation renders excessively difficult the struggle after virtue. Such a situation can have an eroding effect on the moral ethos of the community in question. The ultimate justification of law is that it serves moral ends. It is true that many forms of immorality which can have a corrupting effect are not the subject of prohibitory or penal legislation. However such omissions do not imply a denial of the possibility of corruption or of the erosion of the moral ethos of

the community but acknowledge the practical impossibility of legislating effectively for every area of immorality. Where such legislation is enacted it is a reflection of the concern of the "prudent legislator".

Moreover, it must not be overlooked that much of the basis of the Wolfenden Committee's recommendation that homosexual relations between adult males should be decriminalised was the belief that the law was difficult to enforce and that when enforced was likely to do more harm than good by encouraging other evils such as blackmail. This is obviously not necessarily of universal validity. The relevant conditions may vary from one community to another. Experience also shows that certain sexual activities which are not in themselves contraventions of the criminal law can also be fruitful subjects for blackmail when they offend the moral ethos of the community, e.g. adultery, female homosexuality and, even, where it is not illegal, male homosexuality.

15. Sexual morality is only one part of the total area of morality and a question which cannot be avoided is whether sexual morality is "only private morality" or whether it has an inseparable social dimension. Sexual behaviour is determined more by cultural influences than by instinctive needs. Cultural trends and expectations can create drives mistakenly thought to be intrinsic instinctual urges. The legal arrangement and prescriptions set up to regulate sexual behaviour are very important formative factors in the shaping of cultural and social institutions.

16. In my view, the Court's reference to the fact that in most countries in the Council of Europe homosexual acts in private between adults are no longer criminal (paragraph 60 of the judgment) does not really advance the argument. The twenty-one countries making up the Council of Europe extend geographically from Turkey to Iceland and from the Mediterranean to the Arctic Circle and encompass considerable diversities of culture and moral values. The Court states that it cannot overlook the marked changes which have occurred in the laws regarding homosexual behaviour throughout the member States (ibid.) It would be unfortunate if this should lead to the erroneous inference that a Euro-norm in the law concerning homosexual practices has been or can be evolved.

17. Religious beliefs in Northern Ireland are very firmly held and directly influence the views and outlook of the vast majority of persons in Northern Ireland on questions of sexual morality. In so far as male homosexuality is concerned, and in particular sodomy, this attitude to sexual morality may appear to set the people of Northern Ireland apart from many people in other communities in Europe, but whether that fact constitutes a failing is, to say the least, debatable. Such views on unnatural sexual practices do not differ materially from those which throughout history conditioned the moral ethos of the Jewish, Christian and Muslim cultures.

18. The criminal law at no time has been uniform throughout the several legal systems within the United Kingdom. The Court recognises that where

there are disparate cultural communities residing within the same State it may well be that different requirements, both moral and social, will face the governing authorities (paragraph 56 of the judgment). The Court also recognises that the contested measures must be seen in the context of Northern Ireland society (ibid.). The United Kingdom Government, having responsibility for statutory changes in any of the legal systems which operate within the United Kingdom, sounded out opinion in Northern Ireland on this question of changing the law in respect of homosexual offences. While it is possible that the United Kingdom Government may have been mistaken in its assessment of the effect the sought-after change in the law would have on the community in Northern Ireland, nevertheless it is in as good, if not a better, position than is the Court to assess that situation. Criminal sanctions may not be the most desirable way of dealing with the situation but again that has to be assessed in the light of the conditions actually prevailing in Northern Ireland. In all cultures matters of sexual morality are particularly sensitive ones and the effects of certain forms of sexual immorality are not as susceptible of the same precise objective assessment that is possible in matters such as torture or degrading and inhuman treatment. To that extent the Court's reference in its judgment (paragraph 60) to Tyrer's case is not really persuasive in the present case. It is respectfully suggested that the Marckx judgment is not really relevant in the present case as that concerned the position of an illegitimate child whose own actions were not in any way in question.

19. Even if it should be thought, and I do not so think, that the people of Northern Ireland are more "backward" than the other societies within the Council of Europe because of their attitude towards homosexual practices, that is very much a value judgment which depends totally upon the initial premise. It is difficult to gauge what would be the effect on society in Northern Ireland if the law were now to permit (even with safeguards for young people and people in need of protection) homosexual practices of the type at present forbidden by law. I venture the view that the Government concerned, having examined the position, is in a better position to evaluate that than this Court, particularly as the Court admits the competence of the State to legislate in this matter but queries the proportionality of the consequences of the legislation in force.

20. The law has a role in influencing moral attitudes and if the respondent Government is of the opinion that the change sought in the legislation would have a damaging effect on moral attitudes then in my view it is entitled to maintain the legislation it has. The judgment of the Court does not constitute a declaration to the effect that the particular homosexual practices which are subject to penalty by the legislation in question virtually amount to fundamental human rights. However, that will not prevent it being hailed as such by those who seek to blur the essential difference between homosexual and heterosexual activities.

21. Even the Wolfenden Report felt that one of the functions of the criminal law was to preserve public order and decency and to provide sufficient safeguards against the exploitation and corruption of others and therefore recommended that it should continue to be an offence "for a third party to procure or attempt to procure an act of gross indecency between male persons whether or not the act to be procured constitutes a criminal offence". Adults, even consenting adults, can be corrupted and may be exploited by reason of their own weaknesses. In my view this is an area in which the legislature has a wide discretion or margin of appreciation which should not be encroached upon save where it is clear beyond doubt that the legislation is such that no reasonable community could enact. In my view no such proof has been established in this case.

22. In the United States of America there has been considerable litigation concerning the question of privacy and the guarantees as to privacy enshrined in the Constitution of the United States. The United States Supreme Court and other United States courts have upheld the right of privacy of married couples against legislation which sought to control sexual activities within marriage, including sodomy. However, these courts have refused to extend the constitutional guarantee of privacy which is available to married couples to homosexual activities or to heterosexual sodomy outside marriage. The effect of this is that the public policy upholds as virtually absolute privacy within marriage and privacy of sexual activity within the marriage.

It is a valid approach to hold that, as the family is the fundamental unit group of society, the interests of marital privacy would normally be superior to the State’s interest in the pursuit of certain sexual activities which would in themselves be regarded as immoral and calculated to corrupt. Outside marriage there is no such compelling interest of privacy which by its nature ought to prevail in respect of such activities.

23. It is to be noted that Article 8 § 1 (art. 8-1) of the Convention speaks of "private and family life". If the ejusdem generis rule is to be applied, then the provision should be interpreted as relating to private life in that context as, for example, the right to raise one’s children according to one’s own philosophical and religious tenets and generally to pursue without interference the activities which are akin to those pursued in the privacy of family life and as such are in the course of ordinary human and fundamental rights. No such claim can be made for homosexual practices.

24. In my opinion there has been no breach of Article 8 (art. 8) of the Convention.

Article 14 (art. 14)

25. I agree with the judgment of the Court in respect of Article 14 (art. 14).